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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOSEPH M. HUDSPETH,
Petitioner

v.

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether the Federal Home Loan Bank Board [FHLBB] has exclusive jurisdiction to determine the validity of state law claims against a state-chartered savings and loan association in receivership where the controversy was the subject of pending state court litigation at the time of the appointment of the receiver, so as to deprive both the state and federal courts of subject matter jurisdiction.

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LEGISLATIVE HISTORY

S. Rep. No. 1263, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530-41 3

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NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,
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OPINIONS BELOW

The memorandum order of the district court (App. B 22a) was entered on March 14, 1984. The memorandum order of the district court (App. B 29a) denying motion for reconsideration, was entered on April 18, 1984. The original opinion of the court of appeals (App. B 10a) was issued on April 5, 1985. The revised opinion of the court of appeals (App. A 1a) is reported at 756 F.2d 1096.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit (App. C 32a) was entered on May

23, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES

12 U.S.C. § 1464(d)(6)(C).

12 U.S.C. § 1729(a), (b)(1), (c), (d).

12 U.S.C. § 1730(k)(1).

The full text of the cited statutes is found at Appendix D.

STATEMENT OF THE CASE

A. Background

Prior to 1968, state courts controlled the appointment of receivers of state-chartered savings and loan associations. Although the Federal Savings and Loan Insurance Corporation [FSLIC] could be appointed by the appropriate state authorities, the FHLBB had no authority to impose such an appointment, or to exercise control over the receivership.

Following a series of savings and loan association failures in the mid-60's, during which the FSLIC purportedly suffered losses due to lack of cooperation from state officials, the FHLBB sought additional authority to act in this area. As a result, Congress passed the Bank Protection Act of 1968 which permitted the FHLBB to appoint the FSLIC as a federal receiver of a state-chartered association. 12 U.S.C. § 1729(c)(2), (c)(3). (App. D 38a, 39a).

Subsequent amendments to the Act permit the FHLBB to appoint the FSLIC as sole federal receiver, subject only to the regulation of the Federal Home Loan Bank Board. § 1729(c)(1)(B) (App. D 37a) Under this same provision, the FHLBB can "federalize" a state-appointed FSLIC receiver as well.

Under the Act, the FHLBB-appointed receiver is granted power to conduct specified receivership activities "subject only to the regulation of the Federal Home Loan Bank Board." § 1729(d). In 12 U.S.C. § 1464(d)(6)(A), jurisdiction for suits to oust the FSLIC receiver is placed in the district court. Otherwise, however, "no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver." § 1464(d)(6)(C).

12 U.S.C. § 1730(k)(1), another statute regulating the FSLIC, specifically provides for adjudication in state court of state law claims against state-chartered associations under an FSLIC receiver. Further, traditional receivership case law, which has been applied to FSLIC receivers, does not permit the receiver to strip a court of jurisdiction over pending *in personam* claims antedating the receivership. *Riehle v. Margolis*, 279 U.S. 218 (1929).

The legislative history of the Bank Protection Act makes clear that it was the intent of Congress to resolve only the problem of state regulators preventing the FSLIC from reaching the assets of a failed institution in order to recoup its payments on insured deposits. Nowhere is the intent expressed to grant broad jurisdictional and adjudicatory powers to the FHLBB. Consistent with this limited purpose, the FHLBB testified during Committee hearings on the Act that "where a state official takes over an association with the intent to rehabilitate it or otherwise resolve the association's problems, and the plan has a reasonable chance of success, the Board would not intervene." S. Rep. No. 1263, 90th Cong. 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2530, 2536.

B. The Proceedings in This Case

In December, 1977, petitioner contracted with North Mississippi Savings & Loan Association [Old North], to give Old North the benefit of his good will, his promise not to accept employment with a competing savings and loan association, and his efforts in selling stock to reduce Old North's recapitalization debt of $1.8 million, during its critical transition period from an institution under a state-wide moratorium to a federally insured institution. In return, Old North promised to pay petitioner deferred income in the form of monthly payments and other consideration.

Subsequently, both petitioner and Old North performed their obligations under their contract. Petitioner's primary obligations to Old North were performed within a few years. Old North's primary obligation to petitioner, which was monetary, was to be paid out to him in "installment payments" over petitioner's lifetime. Old North had made these payments for five years and eight months when, on August 18, 1982, it brought a declaratory action in state court to void the contract. Petitioner counterclaimed for the full value of the contract, which he contended he had already substantially performed.

While that litigation was pending, Old North was placed in receivership with the FSLIC first appointed as "state" receiver and, then, immediately "federalized" by the FHLBB as sole federal receiver for Old North. A federally chartered savings and loan, New North Mississippi Federal Savings & Loan Association [New North], was formed to assume the assets and liabilities of Old North. All of Old North's assets and liabilities were transferred to New North, except that respondents claim the liabilities for petitioner's claims in the pending litigation were "left behind" with Old North, which no longer had any apparent assets. On the same day these events occurred, April 11, 1983, petitioner received noti-

fication that "all employment, severance, noncompetition, consulting or other compensation contracts" between petitioner and Old North were "terminated" as of that date.

Subsequent to the receiver's appointment, Old North did not make its contract payments as they became due under the terms of the contract. Because Old North had defaulted on its payments, and because virtually all of the assets of Old North had been transferred to New North, Petitioner amended his counterclaim to reflect these facts and to bring in New North as a "transferee in interest."

New North and the FSLIC as receiver of Old North petitioned for removal to the district court. They then moved to dismiss petitioner's amended counterclaim and Old North's original declaratory complaint or, alternatively, for summary judgment. Petitioner filed a motion for remand.

Respondents took the position that the "proviso" of § 1730(k)(1) (App. D 40a) and traditional receivership law do not apply to "federalized" FSLIC receivers. Rather, they claimed, the Bank Protection Act, as amended, and § 1464(d)(6)(C) grant the FHLBB exclusive jurisdiction to adjudicate the validity of any claims against the association in receivership, even those pending in state or federal court prior to the existence of the receivership, and based on state law.

The district court denied Petitioner's motion for remand and dismissed Petitioner's counterclaim, finding that, under 12 U.S.C. § 1464(d)(6)(C) and 12 U.S.C. § 1729, the FHLBB had exclusive jurisdiction over petitioner's claims. The district court also dismissed Old North's original complaint for mootness, stating that the receiver's termination of the subject contract had ended any need to determine its validity.

On appeal, a unanimous panel of the court of appeals first issued an opinion affirming in part and reversing in

part the district court. (App. B 10a) That decision held that, contrary to the district court's opinion, petitioner had the right to pursue his claim against Old North in state court and have its validity adjudicated there. Following this decision, respondents filed a petition for rehearing and suggestion for rehearing *en banc*. On May 23, 1985, the court of appeals granted the petition for rehearing and issued a revised opinion (App. C 34a) affirming the entirety of the district court's decision. This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

The lower court's holding grants far-reaching jurisdictional and adjudicatory powers to the FSLIC/FHLBB on the basis of statutory provisions never previously considered by this Court. That grant of power is unsupported by the legislative history underlying the interpreted provisions and by the statutory language itself. Moreover, the result of the judgment below conflicts with traditional receivership law and previous decisions of this Court. In addition, it has the effect of nullifying another federal statute, § 1730(k)(1), which also governs the activities of the FSLIC. As the FSLIC has itself represented to the court below, the resolution of this jurisdictional question is a matter of overwhelming public significance. As such, it merits the attention of this Court.

1. In its original opinion, the court of appeals stated:

> Nothing in the relevant statutes or legislative history indicates that the FSLIC has the power to adjudicate claims . . . . The history of the 1968 [Bank Protection] Act reflects no intent to expand the FSLIC's powers beyond those normally assumed by a receiver. Furthermore, 12 U.S.C. § 1729(b)(1)(B) requires the FSLIC, as receiver, to 'pay all valid credit obligations' of the failed institution. Section 1729(d) itself authorizes the FSLIC only to 'settle, compromise or release claims' against the institution. Both sections imply that the FSLIC cannot uni-

> laterally resolve the merits of claims, and that some other entity may, if necessary, decide whether a claim against the institution is in fact valid.

(App. B 18a).

In departing from this view in its revised opinion, the court not only ascribed adjudicatory powers to the FSLIC/FHLBB, but exclusive jurisdiction, to the exclusion of both state and federal courts, to adjudicate any and all claims against an association in receivership:

> [R]esolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets. . . . Such a delay is a 'restraint' within the scope of [Section 1464(d)(6)(C)].

(App. A 8a).

This broad jurisdictional grant allowing unilateral preemption of state and federal court jurisdiction as a "restraint," is unsupported by either the statutory provisions themselves or the legislative history of their enactment. Further, it conflicts with traditional receivership law and previous decisions of this Court.

In *Riehle v. Margolis*, 279 U.S. 218 (1929), this Court held in a unanimous decision, that, although a receiver obtains exclusive jurisdiction to determine questions regarding the collection, liquidation and distribution of the "res" or assets of the corporation for which the receiver has been appointed, it does not obtain exclusive jurisdiction over disputes regarding the validity of claims against the res.

The rule of *Riehle v. Margolis* has been applied in numerous factual situations involving receivers appointed by both state and federal courts, including FSLIC receivers. *See, e.g., FSLIC v. Kreuger*, 435 F.2d 633 (7th Cir. 1970); *Hancock Financial Corp. v. FSLIC*, 492 F.2d 1325 (9th Cir. 1974); *Inland Empire Insurance Co. v. Bair*, 246 F.2d 505 (10th Cir. 1957); *Slotkin v. Brookdale Hospital Center*, 357 F.Supp. 705 (S.D. N.Y. 1972).

The rule was even applied under the old Bankruptcy Act where the bankruptcy court had a statutory grant of "exclusive jurisdiction" to liquidate and distribute the assets of the bankrupt. *See Doyle v. Nemerov's Executors*, 223 F.2d 54 (2d Cir. 1955); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

Such a departure from traditional receivership law, based on statutory provisions never previously addressed by this Court, merits the Court's attention.

The court of appeal's relegation of petitioner's claim to the administrative process also conflicts with the traditional principles of exhaustion that the doctrine requiring exhaustion of administrative remedies does not apply where court proceedings started before the administrative proceedings and that a plaintiff need not resort to administrative remedies when the agency proceedings would be futile. *See City Bank Farmers Trust v. Schnader*, 291 U.S. 24 (1934). Furthermore, the general rule has been that where both a court and an administrative agency have jurisdiction over the subject matter of litigation, the court should not dismiss a pending lawsuit unless the material issues involve matters within the particular expertise of the agency or there is a need for uniformity in decision. *See, e.g., Louisiana & Ark. Ry. v. Export Drum Co.*, 359 F.2d 311 (5th Cir. 1966).

In the present case, the material issues are whether appellant's contract with Old North is in fact a binding contract, whether Old North's breach was tortious, and the status of New North as a transferee in interest. These matters are not at all within the competence of the federal administrative agency since they involve questions of state law. Rather, they are matters peculiarly within the competence of the state court. Nor is there a need for a uniform rule as to the substantive questions involved. This is not one of a recurring number of identical transactions. Under traditional princi-

ples, therefore, the state court would have primary jurisdiction over petitioner's claim.

The lower court's reasoning concerning unacceptable "delay" as a result of adjudicating claims in court fails to consider the delay and economic disadvantage involved in having the FSLIC/FHLBB adjudicate everything from contract claims to tort claims while attempting to discern and apply the substantive law of fifty different states. Far better that the FSLIC/FHLBB should consider state courts their allies rather than their adversaries, thereby utilizing the ability of the state judiciary to apply familiar laws of its own state in determining the validity of state-law claims.

2. In holding that adjudication of claims in state court against a state chartered association in receivership with the FSLIC as sole federal receiver is a "restraint" in violation of § 1464(d)(6)(C), the lower court's decision effectively repeals 12 U.S.C. § 1730(k)(1). Such a result requires this Court's consideration.

In essence the judgment below adopted respondents' theory that § 1729(c)(1)(B) and § 1464(d)(6)(C) render § 1730(k)(1) applicable only to "state" FSLIC receiverships and not ones that have been "federalized." Such an interpretation relegates § 1730(k)(1) to the history books, for it is unlikely there will ever again be "state" FSLIC receivers to be involved in lawsuits involving only state claims. Rather, as in this case, the FSLIC will be able to determine jurisdiction over the claims brought by (redundantly) "federalizing" any state appointed FSLIC receiver.[1] Thus, the lower court's interpretation of one statute would totally nullify a specific provision of another. This is clearly contrary to Congressional intent, since the § 1730(k)(1) proviso has not been amended to exclude so-called "federalized" receivers

[1] This despite the FHLBB's promise noted above that it would not use the federalization provision unless it had no confidence in the state receiver. Here, the state receiver was the FSLIC.

from its scope even though there has been an opportunity to do so in the 1982 amendments to § 1729, at the same time as the passage of the current § 1729(d).

In nullifying the effect of the § 1730(k)(1) proviso, the judgment below results in the loss of not only state court jurisdiction but also federal court jurisdiction. Such a result represents a radical departure from the long-standing policy of this Court that state-law claims should be determined in state courts.

The proviso in § 1730(k)(1) contemplates keeping actions in state court as opposed to removing them to federal court. The proviso is, as such, clearly an embodiment of the rule set forth in *Gully v. First National Bank*, 299 U.S. 109 (1936), which espouses a strong policy that actions which fundamentally concern state-based claims should be left in state court for adjudication. *See also Franchise Tax Board v. Construction*, 77 L.Ed.2d 420 (1983); *Hagans v. Levine*, 415 U.S. 528, 536 (1974); *Public Service Commissioner v. Wycoff Co.*, 344 U.S. 237 (1952); *Superior Oil Co. v. Pioneer Corp.*, 706 F.2d 603 (5th Cir. 1983); *D.M. Maxwell v. First National Bank*, 638 F.2d 32 (5th Cir. 1982); *Borzello v. Sooy*, 427 F.Supp. 332, 334 (N.D. Cal. 1977).

Given the lower court's decision, however, state law claims that would not even be removable from state to federal court under § 1730(k)(1) or under *Gully*, would now be placed under the exclusive jurisdiction of a federal administrative agency. This conflict with, and departure from, a longstanding policy of this Court and express statutory language requires this Court's attention.

3. The FSLIC has represented in argument to the court below that the savings and loan industry is in deterioration nationwide and that hundreds of claims against defunct savings and loan associations are being litigated or may be litigated throughout the United

States. It was argued that, therefore, allowing any claims against an association in receivership to be litigated, or continue to be litigated, in a tribunal other than the FSLIC/FHLBB would inhibit its ability to act quickly and result in economic adversity for the FSLIC.

Thus, it is abundantly clear that under the statutory interpretation adopted by the lower court, the FSLIC is pursuing, and will continue to pursue, a nationwide policy of refusing to allow litigation of claims against associations in receiverships. Such a policy represents a continuing preemption of the judicial function by a federal administrative agency far beyond the bounds of statutory authority.

This wide-scale stripping of jurisdiction from both state and federal courts over pending claims antedating the existence of receiverships, as well as any future claims, is a matter of the utmost importance to creditors and other claimants across this country who, under the FSLIC policy, would be denied a judicial determination in favor of a ruling on their claims by one of the interested parties, the FSLIC. This court should address this matter of fundamental public importance.

Furthermore, the existence of an adverse Fifth Circuit opinion and denial of certiorari will not abate litigation on this complicated jurisdictional question, especially in view of the fact that the FSLIC's position represents such a radical departure from traditional principles. Rather, creditors and other claimants nationwide will pursue judicial relief to the fullest extent possible in each of the circuits. Although a conflict between the circuits is likely,[2] even absent an ultimate conflict, the establish-

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[2] Petitioner is aware of at least one conflicting opinion already at the trial court level in the case of *American Savings & Loan Association v. San Marino Savings & Loan Association, et al.*, No. 179526, Super. Cal., County of San Joaquin, Honorable Frank A. Grande presiding, Tentative order of May 24, 1985, and Order of May 28, 1985, re Defendants' Motion to Dismiss.

ment of a uniform rule now would prevent much unnecessary expense and expenditure of time not only for creditors of defunct savings and loan associations, but for the FSLIC/FHLBB, as well.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4290

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,
Plaintiffs-Appellees,
v.

JOSEPH M. HUDSPETH,
Defendant-Appellant.

May 23, 1985

Appeal from the United States District Court
for the Northern District of Mississippi

Before THORNBERRY, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

REVISED OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A state-court contract dispute between North Mississippi Savings & Loan Association, "Old North," and Joseph M. Hudspeth took on new dimensions when the Federal Savings & Loan Insurance Corporation placed Old North in receivership and transferred its assets to a newly-created institution, New North Mississippi Federal Savings & Loan Association. After Hudspeth amended his counterclaim against Old North to name New

North as a defendant, New North and the FSLIC, as receiver of Old North, removed to federal court and successfully moved to dismiss for lack of subject-matter jurisdiction. Hudspeth challenges both the removal and the dismissal. Because the presence of New North and the FSLIC made this action removable under 12 U.S.C. § 1730(k)(1), and because Hudspeth's claims can be judicially reviewed only after their presentation to the Federal Home Loan Bank Board, we affirm.

I

Until 1977, Joseph Hudspeth was the president of Old North, a state-chartered institution not insured by the Federal Savings & Loan Insurance Corporation. In 1977, the Mississippi legislature passed a statute requiring all state thrift institutions to obtain FSLIC insurance. The Federal Home Loan Bank Board refused to authorize insurance for Old North unless Hudspeth was replaced as president. When Hudspeth stepped down, Old North began paying him a regular monthly amount under what Hudspeth claims was a deferred compensation agreement.

In 1982, Old North filed this action in Mississippi chancery court for a declaration that its agreement with Hudspeth either did not exist or was terminable. Hudspeth counterclaimed for specific performance or damages for breach of contract. Old North continued to make the monthly payments until April of 1983.

On April 11, 1983, the State of Mississippi put Old North into state receivership and appointed the FSLIC as state receiver. On the same day, the FHLBB determined that Old North was insolvent and "federalized" the receivership by naming the FSLIC as the sole receiver of Old North under 12 U.S.C. § 1729(c)(1)(B). The FSLIC then formed a new federally-chartered institution, New North Mississippi Federal Savings & Loan, and appointed a federal conservator to run New North. Old North transferred to New North essentially all of its

assets[1] and all liabilities except Old North's liabilities to its stockholders and any obligation owed by Old North under a compensation agreement such as Hudspeth's. The FSLIC, as receiver of Old North, then terminated all such agreements and stopped the payments to Hudspeth.

The FSLIC, on behalf of Old North, unsuccessfully moved in state court to dismiss the counterclaim. Hudspeth then filed an amended counterclaim joining New North as a party, alleging that New North was a transferee in interest under Mississippi law, and seeking actual and punitive damages from Old North and New North.

The FSLIC and New North removed the action to federal court and moved to dismiss. Hudspeth moved to remand to state court. In a thoughtful opinion, the court denied the motion to remand and granted the motion to dismiss the counterclaim.

II

The district court upheld the removal of federal court primarily on the authority of 12 U.S.C. § 1730(k)(1), which states:

> Notwithstanding any other provision of law, (A) the Corporation [the FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the dis-

[1] New North agreed to reconvey to the FSLIC as receiver, on the FSLIC's request, any potential claim for malfeasance against Old North's officers or employees.

> trict and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Hudspeth argues that the FSLIC is not a "party" to this suit under subsection (B) because it has never been formally joined. Even if the FSLIC is a party, Hudspeth contends that this action "involves only the rights or obligations of investors, creditors, stockholders," and Old North under Mississippi law, and that the statute therefore precludes federal jurisdiction.

In *Farina v. Mission Investment Trust*, 615 F.2d 1068, 1074-75 & n. 19 (5th Cir.1980), this court affirmed the existence of federal jurisdiction under 12 U.S.C. § 1819 (4), the FDIC parallel to § 1730(k)(1), based on the presence of the FDIC as receiver or successor in interest for one defendant, a failed commercial bank. We stated that the formal intervention or joinder of the FDIC was not necessary, and that such a requirement "would render federal pleadings excessively technical" in contradiction of Federal Rules of Civil Procedure 8(e)(1) and 8(f). 615 F.2d at 1074. The rationale of *Farina* is equally applicable here. Even though the FSLIC has not been formally joined, it is a party in the contemplation of § 1730 (k)(1).

The § 1730(k)(1) proviso cited by Hudspeth excepts from the statute's general grant of federal jurisdiction

actions where two conditions are both present: (1) only the rights or obligations of investors, creditors, stockholders, and a State-chartered institution in FSLIC receivership or conservatorship are at issue, and (2) only questions of state law are involved. Hudspeth, though, sued and demanded damages from New North, a federally-chartered institution that was neither an investor, creditor, nor stockholder of Old North. Hudspeth's action asked the court to determine New North's rights and obligations and thus was not governed by the proviso. *See American National Bank v. FDIC*, 710 F.2d 1528, 1533 n. 5 (11th Cir.1983) (parallel proviso, 12 U.S.C. § 1819(4), inapplicable when third party's rights are involved). Removal was therefore proper under § 1730(k)(1)(B) and (C).

III

The district court construed Hudspeth's counterclaim as a challenge to the validity of the FCLIC's termination of the compensation contract and its transfer of Old North's assets and liabilities to New North. The court then relied on 12 U.S.C. § 1464(d)(6)(C):

> Except as otherwise provided in this subsection, no court may . . . , except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver.

and 12 U.S.C. § 1729(d):

> In connection with the liquidation of insured institutions, the [FSLIC] shall have power . . . to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board. . . .

in holding that "original jurisdiction over the conduct of FSLIC . . . lies with FHLBB," rather than any court.[2] Stating that Hudspeth's sole remedy was a petition to the FHLBB, with judicial review then available under the Administrative Procedure Act, the court dismissed the counterclaim for lack of subject matter jurisdiction.

Hudspeth's counterclaim seeks a declaratory judgment that the contract remains valid and binding, as well as exemplary and mental-anguish damages based on the allegedly wrongful termination of the contract. Alternatively, it avers that Hudspeth has "substantially completed his performance under the aforesaid contract and has a valid credit claim,"[3] and demands a money judgment for the present value of the contract at the time payment stopped. In addition, Hudspeth seeks to impose liability for this claim on New North as Old North's "transferee in interest" under Mississippi law. *See West Center Apartments Ltd. v. Keyes*, 371 So.2d 854 (Miss. 1979).

In explaining the Bank Protection Act of 1968, which made § 1464(d)(6)(C) applicable in receiverships of state thrift institutions, the Senate confirmed that the FSLIC's authority "[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board . . . ." S. Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968

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[2] Section 1464(d)(6)(C), passed as part of the Financial Institutions Supervisory Act of 1966, originally applied only to receiverships of federally-chartered institutions. Section 1729(d) was part of the Bank Protection Act of 1968, which empowered the FHLBB to appoint the FSLIC as federal receiver of state-chartered thrifts. The 1968 Act also made § 1464(d) applicable in such "federalized" receiverships. *See* 12 U.S.C. § 1729(c)(3)(A).

[3] The district court dismissed the counterclaim on the pleadings and we accept Hudspeth's allegation of substantial performance as true for purposes of this appeal. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

U.S.Code Cong. & Admin.News 2530, 2539. Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

The statutory scheme thus routes to the administrative process Hudspeth's assertion that FHLBB regulations did not authorize the FSLIC here to set aside an otherwise-enforceable contract.[4] That act was unquestionably an exercise of the FSLIC's powers as a receiver, analogous to a trustee's rejection of a contract in a bankruptcy proceeding. *See* 11 U.S.C. § 365(a).

Similarly, Hudspeth's attempt to charge New North with Old North's debt, despite the FSLIC's failure to transfer that liability, crosses the line drawn by the relevant statutes. The FSLIC, in working out the terms of the transfer between Old North and New North, essentially acted as a liquidator. It allocated the demands of competing claimants to Old North's limited assets by, in effect, relegating two classes of claimants—Old North stockholders, and Hudspeth—to second-priority status, leaving for satisfaction of their claims only the right of Old North to reacquire from New North any claims for officer malfeasance.

Once again, it is not our job to decide whether the FSLIC could parcel out Old North's assets in this particular manner. The FSLIC has the authority to liqui-

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[4] Hudspeth argues that although 12 C.F.R. § 569a.6(c)(3) gives the FSLIC, as receiver of a nonfederal institution, the power to "[r]eject or repudiate any lease or contract which it considers burdensome," § 569a.13 makes § 569a.6(c)(3) inapplicable to purchase and assumption transactions. The FSLIC replies that the FHLBB resolution appointing the FSLIC as Old North's receiver expressly granted the FSLIC the powers of a receiver of a federal association, which contain no restriction corresponding to § 569a.13. *See* 12 C.F.R. §§ 549.3, 548.2. We intimate no view on this issue.

date failed institutions. 12 U.S.C. §§ 1729(a), (b)(1)(A)(v), (c)(3)(B), and (d). Indeed, the motivating force behind the passage of the Bank Protection Act of 1968 was to permit the FSLIC to intervene in state receiverships not geared toward liquidation, so that it could order liquidation and recoup its insurance payments to savers. *See* S.Rep. No. 1263, 90th Cong., 2d Sess. 8, 11, *reprinted in* 1968 U.S.Code Cong. & Admin.News 2530, 2537, 2540. Inherent in the power to liquidate is the right to "[fix] the time and manner of distribution" of assets. *Morris v. Jones*, 329 U.S. 545, 549, 67 S.Ct. 451, 454 91 L.Ed. 488 (1947). Even if otherwise correct under Mississippi law, any court ruling that New North bears a liability not assigned it by the FSLIC would modify the FSLIC's distribution of assets, and would "restrain or affect" the FSLIC's powers as a receiver in violation of 12 U.S.C. § 1464(d)(6)(C).

Finally, Hudspeth argues that at the very least, §§ 1464(d)(6)(C) and § 1729(d) are no bar to a mere judicial adjudication that Old North owed a debt to Hudspeth. It cites *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669 (1929), for the proposition that the adjudication of claims against a debtor, as opposed to the allocation of assets to satisfy those claims, is not a receivership function, and that judical resolution of claims therefore does not "restrain or affect" the receiver's conduct. At the FSLIC points out, though, resolution of even the facial merits of claims outside of the statutory reorganization process would delay the receivership function of distribution of assets: the FSLIC would not be able to determine how much to pay other claimants until the termination of the parallel litigation. Given the overriding Congressional purpose of expediting and facilitating the FSLIC's task as receiver, such a delay is a "restraint" within the scope of the statute.

Our conclusion is fortified by the existence of FHLBB regulations setting forth procedures for FSLIC payment

of creditor claims. Under these regulations, the FSLIC gives notice to creditors to present their claims, and then may disallow claims "not proven to its satisfaction." Any disallowed claims are submitted to the FHLBB for review. 12 C.F.R. §§ 569a.8, 549.4.[5] This administrative process serves to hasten the resolution of the receivership proceedings, in keeping with the Congressional purpose. Furthermore, the regulations reflect the view of the FHLBB, the enforcing agency for the relevant banking statutes, that the FSLIC is empowered to decide claims as part of its receivership function. The FHLBB's opinion is entitled to our deference. *Mattox v. FTC*, 752 F.2d 116, 123-24 (5th Cir.1985); *Chevron U.S.A. v. Natural Resources Defense Council*, —— U.S. ——, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694 (1984).

IV

In short, all of Hudspeth's claims are switched to the administrative track by § 1464(d)(6)(C). Hudspeth can challenge the FSLIC's actions before the FHLBB, and, if unsatisfied, can seek judicial review under the APA. *See First Savings & Loan Ass'n v. First Federal Savings & Loan Ass'n*, 531 F.Supp. 251, 254 (D.Haw. 1981). Because the statute prevents him from going forward in any court before seeking FHLBB review, though, the district court correctly dismissed his counterclaim.

AFFIRMED.

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[5] As with the regulations concerning rejection of contracts, n. 4, *supra*, whether the FSLIC followed its claims regulations in Hudspeth's case is irrelevant. The regulations, observed or not, are evidence that adjudication *is* a receivership function in FSLIC receiverships.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-4290

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and
NEW NORTH MISSISSIPPI FEDERAL SAVINGS &
LOAN ASSOCIATION,
Plaintiffs-Appellees,
v.

JOSEPH M. HUDSPETH,
Defendant-Appellant.

April 5, 1985

Appeal from the United States District Court
for the Northern District of Mississippi

Before THORNBERRY, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

A state-court contract dispute between North Mississippi Savings & Loan Association, "Old North," and Joseph M. Hudspeth took on new dimensions when the Federal Savings & Loan Insurance Corporation placed Old North in receivership and transferred its assets to a newly-created institution, New North Mississippi Federal Savings & Loan Association. After Hudspeth amended

his counterclaim against Old North to name New North as a defendant, New North and the FSLIC, as receiver of Old North, removed to federal court and successfully moved to dimiss for lack of subject-matter jurisdiction. Hudspeth challenges both the removal and the dismissal. We hold that the presence of New North and the FSLIC made this action removable under 12 U.S.C. § 1730(k)(1). We also agree that the district court properly dismissed all of Hudspeth's claims against New North and much of his action against Old North. One of Hudspeth's claims though—against Old North for payment for past services rendered—is not barred by the relevant federal statutes, 12 U.S.C. §§ 1464(d)(6)(C) and 1729(d). The survival of this state-law claim against a failed state institution, coupled with the dismissal of New North, makes remand to state court now appropriate.

I

Unitl 1977, Joseph Hudspeth was the president of Old North, a state-chartered institution not insured by the Federal Savings & Loan Insurance Corporation. In 1977, the Mississippi legislature passed a statute requiring all state thrift institutions to obtain FSLIC insurance. The Federal Home Loan Bank Board refused to authorize insurance for Old North unless Hudspeth was replaced as president. When Hudspeth stepped down, Old North began paying him a regular monthly amount under what Hudspeth claims was a deferred compensation agreement.

In 1982, Old North filed this action in Mississippi chancery court for a declaration that its agreement with Hudspeth either did not exist or was terminable. Hudspeth counterclaimed for specific performance or damages for breach of contract. Old North continued to make the monthly payments until April of 1983.

On April 11, 1983, the State of Mississippi put Old North into state receivership and appointed the FSLIC

as state receiver. On the same day, the FHLBB determined that Old North was insolvent and "federalized" the receivership by naming the FSLIC as the sole receiver of Old North under 12 U.S.C. § 1729(c)(1)(B). The FSLIC then formed a new federally-chartered institution, New North Mississippi Federal Savings & Loan, and appointed a federal conservator to run New North. Old North transferred to New North essentially all of its assets [1] and all liabilities except Old North's liabilities to its stockholders and any obligation owed by Old North under a compensation agreement such as Hudspeth's. The FSLIC, as receiver of Old North, then terminated all such agreements and stopped the payments to Hudspeth.

The FSLIC, on behalf of Old North, unsuccessfully moved in state court to dismiss the counterclaim. Hudspeth then filed an amended counterclaim joining New North as a party, alleging that New North was a transferee in interest under Mississippi law, and seeking actual and punitive damages from Old North and New North.

The FSLIC and New North removed the action to federal court and moved to dismiss. Hudspeth moved to remand to state court. In a thoughtful opinion, the court denied the motion to remand and granted the motion to dismiss the counterclaim.

II

The district court upheld the removal to federal court primarily on the authority of 12 U.S.C. § 1730(k)(1), which states:

> Notwithstanding any other provision of law, (A) the Corporation [the FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit,

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[1] New North agreed to reconvey to the FSLIC as receiver, on the FSLIC's request, any potential claim for malfeasance against Old North's officers or employees.

> or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

Hudspeth argues that the FSLIC is not a "party" to this suit under subsection (B) because it has never been formally joined. Even if the FSLIC is a party, Hudspeth contends that this action "involves only the rights or obligations of investors, creditors, stockholders," and Old North under Mississippi law, and that the statute therefore precludes federal jurisdiction.

In *Farina v. Mission Investment Trust*, 615 F.2d 1068, 1074-75 & n. 19 (5th Cir.1980), this court affirmed the existence of federal jurisdiction under 12 U.S.C. § 1819 (4), the FDIC parallel to § 1730(k)(1), based on the presence of the FDIC as receiver or successor in interest for one defendant, a failed commercial bank. We stated that the formal intervention or joinder of the FDIC was

not necessary, and that such a requirement "would render federal pleadings excessively technical" in contradiction of Federal Rules of Civil Procedure 8(e)(1) and 8(f). 615 F.2d at 1074. The rationale of *Farina* is equally applicable here. Even though the FSLIC has not been formally joined, it is a party in the contemplation of § 1730(k)(1).

The § 1730(k)(1) proviso cited by Hudspeth excepts from the statute's general grant of federal jurisdiction actions where two conditions are both present: (1) only the rights or obligations of investors, creditors, stockholders, and a State-chartered institution in FSLIC receivership or conservatorship are at issue, and (2) only questions of state law are involved. Hudspeth, though, sued and demanded damages from New North, a federally-chartered institution that was neither an investor, creditor, nor stockholder of Old North. Hudspeth's action asked the court to determine New North's rights and obligations, and thus was not governed by the proviso. *See American National Bank v. FDIC*, 710 F.2d 1528, 1533 n. 5 (11th Cir.1983) (parallel proviso, 12 U.S.C. § 1819(4), inapplicable when third party's rights are involved). Removal was therefore proper under § 1730(k)(1)(B) and (C).

III

The district court construed Hudspeth's counterclaim as a challenge to the validity of the FSLIC's termination of the compensation contract and its transfer of Old North's assets and liabilities to New North. The court then relied on 12 U.S.C. § 1464(d)(6)(C):

> Except as otherwise provided in this subsection, no court may . . . , except at the instance of the [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver.

and 12 U.S.C. § 1729(d):

> In connection with the liquidation of insured institutions, the [FSLIC] shall have power . . . to

> settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board. . . .

In holding that "original jurisdiction over the conduct of FSLIC . . . lies with FHLBB," rather than any court.[2] Stating that Hudspeth's sole remedy was a petition to the FHLBB, with judicial review then available under the Administrative Procedure Act, the court dismissed the counterclaim for lack of subject matter jurisdiction.

Hudspeth's counterclaim seeks a declaratory judgment that the contract remains valid and binding, as well as exemplary and mental-anguish damages based on the allegedly wrongful termination of the contract. Alternatively, it avers that Hudspeth has "substantially completed his performance under the aforesaid contract and has a valid credit claim,"[3] and demands a money judgment for the present value of the contract at the time payment stopped. In addition, Hudspeth seeks to impose liability for this claim on New North as Old North's "transferee in interest" under Mississippi law. *See West Center Apartments Ltd. v. Keyes*, 371 So.2d 854 (Miss. 1979).

In explaining the Bank Protection Act of 1968, which made § 1464(d)(6)(C) applicable in receiverships of

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[2] Section 1464(d)(6)(C), passed as part of the Financial Institutions Supervisory Act of 1966, originally applied only to receiverships of federally-chartered institutions. Section 1729(d) was part of the Bank Protection Act of 1968, which empowered the FHLBB to appoint the FSLIC as federal receiver of state-chartered thrifts. The 1968 Act also made § 1464(d) applicable in such "federalized" receiverships. *See* 12 U.S.C. § 1729(c)(3)(A).

[3] The district court dismissed the counterclaim on the pleadings and we accept Hudspeth's allegation of substantial performance as true for purposes of this appeal. *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981).

state thrift institutions, the Senate confirmed that the FSLIC's authority "[i]n carrying out its receivership responsibilities . . . would be subject only to the regulation of the Federal Home Loan Bank Board. . . ." S.Rep. No. 1263, 90th Cong., 2d Sess. 10, *reprinted in* 1968 U.S. Code Cong. & Admin.News 2530, 2539. Congress wanted the FSLIC to be able to act quickly and decisively in reorganizing, operating, or dissolving a failed institution, and intended that the FSLIC's ability to accomplish these goals not be interfered with by other judicial or regulatory authorities.

The statutory scheme thus routes to the administrative process Hudspeth's assertion that FHLBB regulations did not authorize the FSLIC here to set aside an otherwise-enforceable contract.[4] That act was unquestionably an exercise of the FSLIC's powers as a receiver, analogous to a trustee's rejection of a contract in a bankruptcy proceeding. *See* 11 U.S.C. § 365(a).

Similarly, Hudspeth's attempt to charge New North with Old North's debt, despite the FSLIC's failure to transfer that liability, crosses the line drawn by the relevant statutes. The FSLIC, in working out the terms of the transfer between Old North and New North, essentially acted as a liquidator. It allocated the demands of competing claimants to Old North's limited assets by, in effect, relegating two classes of claimants—Old North stockholders, and Hudspeth—to second-priority status, leaving for satisfaction of their claims only the right of

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[4] Hudspeth argues that although 12 C.F.R. § 569a.6(c)(3) gives the FSLIC, as receiver of a nonfederal institution, the power to "[r]eject or repudiate any lease or contract which it considers burdensome," § 569a.13 makes § 569a.6(c)(3) inapplicable to purchase and assumption transactions. The FSLIC replies that the FHLBB resolution appointing the FSLIC as Old North's receiver expressly granted the FSLIC the powers of a receiver of a federal association, which contain no restriction corresponding to § 569a.13. *See* 12 C.F.R. §§ 549.3, 548.2. We intimate no view on this issue.

Old North to reacquire from New North any claims for officer malfeasance.

Once again, it is not our job to decide whether the FSLIC could parcel out Old North's assets in this particular manner. The FSLIC has the authority to liquidate failed institutions. 12 U.S.C. §§ 1729(a), (b)(1)(A)(v), (c)(3)(B), and (d). Indeed, the motivating force behind the passage of the Bank Protection Act of 1968 was to permit the FSLIC to intervene in state receiverships not geared toward liquidation, so that it could order liquidation and recoup its insurance payments to savers. *See* S.Rep. No. 1263, 90th Cong., 2d Sess. 8, 11, *reprinted in* 1968 U.S.Code Cong. & Admin. News 2530, 2537, 2540. Inherent in the power to liquidate is the right to "[fix] the time and manner of distribution" of assets. *Morris v. Jones*, 329 U.S. 545, 549, 67 S.Ct. 451, 454, 91 L.Ed. 488 (1947). Even if otherwise correct under Mississippi law, any court ruling that New North bears a liability not assigned it by the FSLIC would modify the FSLIC's distribution of assets, and would "restrain or affect" the FSLIC's powers as a receiver in violation of 12 U.S.C. § 1464(d)(6)(C).

All of Hudspeth's claims of injury caused by FSLIC conduct are thus switched to the administrative track by § 1464(d)(6)(C). These include all claims for exemplary damages and for mental anguish stemming from the FSLIC's acts. Hudspeth can challenge the FSLIC's behavior *qua* receiver before the FHLBB, and, if unsatisfied, can seek judicial review under the APA. *See First Savings & Loan Ass'n v. First Federal Savings & Loan Ass'n*, 531 F.Supp. 251, 254 (D.Haw.1981).

To the extent, however, that the counterclaim demands only that Old North's debt to Hudspeth be judicially established, we agree with Hudspeth that §§ 1464(d)(6)(C) and 1729(d) are no bar. The Supreme Court explained in *Riehle v. Margolies*, 279 U.S. 218, 49 S.Ct. 310, 73 L.Ed. 669 (1929) and *Morris v. Jones*, 329 U.S. 545,

67 S.Ct. 451, 91 L.Ed. 488 (1947)[5] that the adjudication of claims against a debtor, as opposed to the allocation of assests to satisfy those claims, is not a receivership function. As Justice Douglas said in *Morris*:

> [P]roof and allowance of claims are matters distinct from distribution. They do not "deal directly with any of the property." . . . The establishment of the existence and amount of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have.

329 U.S. at 549, 67 S.Ct. at 454, *quoting Riehle*, 279 U.S. at 224, 49 S.Ct. at 312.

Nothing in the relevant statutes or legislative history indicates that the FSLIC has the power to adjudicate claims. As explained above, Congress in 1968 sought to make applicable to state institutions the FSLIC's power to liquidate. The history of the 1968 Act reflects no intent to expand the FSLIC's powers beyond those normally assumed by a receiver. Furthermore, 12 U.S.C. § 1729(b)(1)(B) requires the FSLIC, as receiver, to "pay all valid credit obligations" of the failed institution. Section 1729(d) itself authorizes the FSLIC only to "settle, compromise, or release claims" against the institution. Both sections imply that the FLIC cannot uni-

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[5] *Riehle* dealt with an equitable receivership under state law. *Morris*, an insurance liquidation case, raised questions under the Full Faith and Credit Clause of the U.S. Constitution. The principle they state has been applied in federal bankruptcy cases, *see, e.g., Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 517 (2d Cir. 1975), and was recently reaffirmed by the Supreme Court. *Underwriters National Assurance Co. v. North Carolina Life and Accident and Health Insurance Guaranty Ass'n*, 455 U.S. 691, 711 n. 19, 102 S.Ct. 1357, 1369 n. 19, 71 L.Ed.2d 558 (1982); *id.* at 718, 102 S.Ct. at 1373 (White, J., concurring in the judgment). We find the reasoning of *Riehle* and *Morris* applicable to this federal bank receivership.

laterally resolve the merits of claims, and that some other entity may, if necessary, decide whether a claim against the institution is in fact valid.

Our decision is no doubt little comfort to Hudspeth. Although he might judicially establish Old North's debt, he will not be able to enforce that debt against New North unless he seeks administrative review before the FHLBB.[6] To explain our view here, we suggest that other potential judgment creditors of insolvent thrifts might fare differently. Not all FSLIC receiverships involve liquidation; the FSLIC can take more limited action, such as replacing a thrift's officers, 12 U.S.C. § 1464 (d)(4); loaning it money, § 1729(f)(1); or operating the institution itself, § 1729(b)(1)(A)(i). If the FSLIC, as receiver, takes no steps purporting to impede the rights of any of the institution's creditors to full recovery, we see no statutory bar to a claimant's obtaining a court judgment, enforceable by the rendering court.

Finally, because New North must be dismissed as counterdefendant, Hudspeth's surviving claim now falls within the proviso of 12 U.S.C. § 1730(k)(1). That claim rests only on Mississippi law, and involves as parties only Hudspeth and the FSLIC as receiver of a state savings and loan. Under the proviso, the case should now be remanded to the Mississippi courts. We reject the FSLIC's assertion that the § 1730(k)(1) proviso is inapplicable to federalized receiverships. The proviso contemplates actions "under State law" against the FSLIC "in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution." By its terms, the proviso is not limited to suits against the FSLIC as state receiver. Concededly, when § 1730(k)(1) was passed in 1966, only a state court could have named

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[6] A judgment that Hudspeth's claim is legally valid might, of course, color the FHLBB's view concerning Hudspeth's right to recover, and might be considered relevant by a reviewing court in an APA action.

the FSLIC as receiver of a state thrift. There is no evidence, though, that the 1968 act creating federalized receiverships was meant to limit the scope of the proviso by redefining as "federal" ordinary contract or tort actions not implicating receivership functions.

IV

When read in concert, 12 U.S.C. §§ 1464(d)(6)(C), 1729, and 1730(k)(1) construct an orderly scheme. In suits against a state savings institution in a federalized receivership, where the relief requested would interfere with or overturn the effect of any exercise of receivership power, the suit must be dismissed in favor of administrative proceedings before the FHLBB. If, however, an action is based on the pre-receivership conduct of the failed institution, the debt due may be judicially established. If federal jurisdiction otherwise exists, if federal law is involved, or if there is a party to the suit who is not a state-chartered institution in FSLIC receivership or conservatorship or an investor, creditor, or stockholder of such an institution, the case is removable to federal district court. The presence of a third party would not always mean, as here, that receivership functions were involved and that the suit should be dismissed. The third party might not be a transferee of assets—it could be, for example, a codefendant. If the claim relies only on state law, and if no third party's rights are at issue, the state court suit is not removable under 12 U.S.C. § 1730(k)(1).

Hudspeth's claims that challenge the FSLIC's receivership operations were properly dismissed. Hudspeth, however, also alleges a matured claim not dependent on any judicial assessment of the FSLIC's acts.[7] This claim de-

[7] Of course, denying that Old North had liability under the contract is an act of the receiver, but it does not implicate the competing concerns of the regulator and creditors of the failed institution, and is not an "act" in the sense we use it here.

rives from Mississippi law, and in the Mississippi court can be asserted only against the failed State institution, Old North. Therefore, Hudspeth's demand for judicial establishment of Old North's obligation to him, should he wish to proceed with it, should be remanded to state court. Any debt so established can then be the basis for a claim filed with the FHLBB.

We affirm the district court's original denial of remand to state court, reverse in part the dismissal of Hudspeth's counterclaim, and remand with instructions to remand to state court Hudspeth's claim against Old North.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

Civil Action No. WC 83-193-WK-P

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION (Federal Savings & Loan Insurance Corporation, Receiver), and NEW NORTH MISSISSIPPI FEDERAL SAVINGS & LOAN ASSOCIATION,

Plaintiffs,

v.

JOSEPH M. HUDSPETH,

Defendant.

MEMORANDUM ORDER

On August 8, 1982, North Mississippi Savings and Loan Association (Old North) commenced this action in the Chancery Court of Lafayette County, Mississippi, seeking to void a contract for personal services between Old North and defendant John M. Hudspeth. Old North was a savings and loan association chartered under state law, Miss. Code Ann. § 81-12-1 *et seq.*, whose accounts were insured by Federal Savings and Loan Insurance Corporation (FSLIC). Defendant counterclaimed asserting the validity of the contract. On April 11, 1983, FSLIC was appointed state receiver of Old North after the Lafayette County Chancery Court granted the application of the Commissioner of the Savings Associations of Mississippi requesting such relief. On that same date, the Federal Home Loan Bank Board (FHLBB), pursuant to 12 U.S.C. § 1729(c)(1)(B),[1] determined

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[1] Section 1729(c)(1)(B)(i)(I) provides:

Notwithstanding any provision of the constitution or laws of any State, or of this section, in the event the Federal Home

that Old North was insolvent and replaced the state receivership naming FSLIC as federal receiver.

FSLIC immediately organized New North Mississippi Federal Savings and Loan Association (New North) to take over the assets and liabilities of Old North, and FHLBB appointed H. Lawrence Stacy conservator of New North. With the exception of defendant's claim, virtually all the assets and liabilities of Old North were transferred to New North under an acquisition agreement between FSLIC and New North.[2] On October 13, 1983, defendant filed an amended answer and counterclaim adding New North as counter-defendant. FSLIC and New North then removed the action to this court and have moved to dismiss the complaint and amended counterclaim, or in the alternative for summary judgment. Defendant has filed a motion to remand.

Two questions arise: first, is the action removable to federal court; second, if it is removable, is the defendant's counterclaim maintainable here.

Defendant urges that the case is not removable since (a) FLISC is not a party to the action, (b) that since the FSLIC is receiver of a state-chartered institution and the chancery court suit "involves only the rights or obligations of investors, creditors, and stockholders," the

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Loan Bank Board determines that any of the grounds specified in section 1464(d)(6)(A)(i) [insolvency], (ii) [substantial dissipation of assets], or (iii) [unsafe or unsound condition] of this title exist with respect to an insured institution, other than a Federal association, the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver of such institution.

[2] Section 2 of the Acquisition Agreement provided that New North acquire all the liabilities of Old North excluding, "any obligations under any employment, severance, non-competitive, consulting, or other compensation contracts between [Old North] and any of its employees, officers or directors.

proviso in 28 U.S.C. § 1730(k)(1)[3] precludes removal since the action "shall not be deemed to arise under the laws of the United States," and (c) the case is not removable under 28 U.S.C. § 1331 (federal question), § 1345 (federal agency as plaintiff) or § 1442 (federal agency as defendant). The court does not agree with the defendant's contentions and concludes that the case is removable.

The argument that FSLIC, as a federal receiver of Old North, is not a party to the action and that only questions of state law are involved in the chancery suit is not persuasive. The appointment by FHLBB of FSLIC as receiver of a savings and loan association vested FSLIC "with all of the powers of the members, the directors, and the officers of the association," with authority to operate the association in its own name or to conserve its assets as authorized by the Board, 12 U.S.C.

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[3] Section 1730(k)(1) provides:

> Notwithstanding any other provision of law, (A) the Corporation [FSLIC] shall be deemed to be an agency of the United States within the meaning of section 451 of Title 28; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: *Provided*, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and [which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law] shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.

§ 1464(d)(6)(D), and to do all things subject to FHLBB's regulation. 12 U.S.C. § 1729(d); 12 C.F.R. §§ 547.7 and 548.2. *First Savings and Loan Ass'n* v. *First Federal Savings and Loan Ass'n of Hawaii*, 547 F. Supp. 988, 994 (D. Hawaii 1982). When, as here, FHLBB Resolution No. 83216, April 11, 1983, expressly empowered FSLIC to act with the "powers, rights, privileges, and immunities of a receiver of a federal association," FSLIC had full authority to act in the instant litigation. Moreover, it has actively participated in the suit, having filed pleadings and motions, made appearance in state court, and sought to remove the case here. Even though FSLIC has not technically been substituted as a party for Old North, it necessarily has a legally indistinguishable status.

Defendant asserts that *only* questions of state law are involved in determining contractual rights between him and Old North, and since Old North is not in liquidation but its assets and liabilities have been assumed by New North, § 1730(k)(1)'s proviso precludes removal to federal court. This argument ignores the fact that defendant's counterclaim challenges the validity, or propriety, of the transfer of assets and liabilities which FSLIC sought to effectuate from Old North to New North and in a manner specifically authorized by FHLBB. Federal regulations expressly extend to a conservator or receiver the right "to repudiate any lease contract which he considers burdensome." 12 C.F.R. §§ 548.2(k) and 569.6(c)(3). FSLIC terminated the contract with defendant, and New North did not assume it under the acquisition agreement. Whether this could be done only in case of liquidation, as defendant contends, and not in a case of transfer of assets and liabilities directly presents issues which challenge FHLBB's authority, and constitute questions of federal, and not state law. Thus, it cannot be said that the chancery suit, from and after FSLIC's appointment as receiver and the acts taken by it, involves "only the rights or obligations of investors,

creditors, [and] stockholders" within the proviso's language so as to preclude removal. Additionally, it is undisputed that New North, which timely joined with FSLIC in the removal, is a federally chartered savings and loan association acting through a federal conservator appointed by FHLBB, has the right to remove a case under § 1442 as an entity acting under an "officer of the United States." The motion to remand must, therefore, be denied.

Plaintiffs contend that defendant's amended counterclaim should be dismissed arguing that the state court lacked subject matter jurisdiction over defendant's claim. We agree. When the state court lacks jurisdiction over an action, the federal court acquires no jurisdiction upon removal. *See Armstrong* v. *Alabama Power Co.*, 667 F.2d 1385 (11th Cir. 1982) (jurisdiction of a federal court over a removed case can be no greater than that of the state court whence the case came).

As we have already observed, questions regarding FSLIC's termination of a contract or its power to do so as a receiver should be addressed to FHLBB, because original jurisdiction over the conduct of FSLIC or the conservator of New North lies with FHLBB. 12 U.S.C. § 1464(6)(c) provides, in part, that "no court may . . . , except at the instance of the Board [FHLBB], restrain or affect the exercise of powers or functions of a conservator or receiver." Rather than asserting his counterclaim, defendant first should have taken steps to present his grievances to FHLBB for an administrative determination. Upon FHLBB's failure to grant defendant's desired relief, judicial review is available under § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *See First Savings and Loan Association* v. *First Federal Savings and Loan Association*, 531 F. Supp. 251, 254 (D. Hawaii 1981).

Legislative history confirms that Congress intended for FHLBB to exercise exclusive jurisdiction over FSLIC

when FSLIC is appointed federal receiver. With respect to the passage of the Bank Protection Act of 1968, 12 U.S.C. §§ 1729, 1881-1884, which first authorized FHLBB to federalize appointment of a receiver for state savings and loan associations, Senate Report No. 1263 provides:

> In carrying out its receivership responsibilities, the committee expects the FSLIC to give due consideration to the interest of all of the claimants upon the assets of the association, including general creditors, uninsured depositors, and association stockholders. The authority of the FSLIC in this regard would be subject only to the regulation of the Federal Home Loan Bank Board and not that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution.

Senate Rep. No. 1263, 90th Cong., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2530, 2539. Finally, because FSLIC terminated the contract between Old North and defendant, no issues remain to be decided vis-a-vis the original complaint and counterclaim. Further, the denial of plaintiffs' motion to dismiss in state court does not preclude granting dismissal here. Full faith and credit will not be given a judgment, if the rendering court did not have jurisdiction over the parties and the subject matter. *See Fehlaber* v. *Fehlaber*, 681 F.2d 1015 (5th Cir. 1982).

Therefore, we conclude that because the state court lacked jurisdiction over defendant's counterclaim, this court acquired no jurisdiction upon removal, and this case is appropriate for dismissal. Because the motion to dismiss is well taken, we need not consider plaintiffs' alternative motion for summary judgment.

Accordingly, it is

ORDERED:

That defendant's motion to remand is hereby DENIED, and plaintiffs' motion to dismiss the counterclaim for lack of subject matter jurisdiction and to dismiss the complaint for mootness is hereby GRANTED. All costs are taxed to defendant.

This 12th day of March, 1984.

/s/ William C. Keady
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

No. WC83-193-WK-P

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION, *etc., et al.*,
Plaintiffs

v.

JOSEPH M. HUDSPETH,
Defendant

MEMORANDUM ORDER

On March 12, 1984, this court entered an order denying defendant Joseph M. Hudpeth's motion to remand this case and granting plaintiffs' motion to dismiss defendant's counterclaim for lack of subject matter jurisdiction and to dismiss the complaint for mootness. Defendant moves the court to reconsider its order.

Defendant argues that the Supreme Court's decision in *Gully* v. *First National Bank*, 299 U.S. 109 (1936) clearly supports remand of this case to state court. Contrary to defendant's assertion, the situation in *Gully* is not "virtually identical" to the case *sub judice*. *Gully* involved an acquisition agreement between two banks in which one bank agreed to assume the debts of the other. The new bank violated the terms of the agreement by refusing to pay the taxes of the insolvent bank, and the state tax collector filed suit in state court to enforce payment. Defendant bank effected removal of the case to federal court, and the Supreme Court ordered remand of the case to state court rejecting the argument that the suit was one arising "under the Constitution or laws

of the United States." The district court and court of appeals upheld federal jurisdiction concluding that because the power to tax the shares of national banks had its origin in the provisions of a federal statute, a litigant suing for the tax necessarily relies upon that statute. In its reversal, the Supreme Court, noting that federal incorporation alone is not a basis for jurisdiction, determined that only a conjectural federal question existed relative to the tax in dispute.

In this case, unlike the situation in *Gully*, defendant's contract with Old North was terminated by FSLIC, and New North did not assume it under the acquisition agreement. Also, there was no connection between the enforcement of the contract in *Gully* and federal law. In spite of attempts to "waive or disaffirm" any language in his counterclaim which would defeat state court jurisdiction, defendant, by seeking to enforce its contract against New North as "a mere stakeholder" of Old North's assets directly challenges FHLBB's authority and the validity of FSLIC's transfer to assets and liabilities from Old North to New North. This raises questions of federal law essential to determining the propriety of defendant's claim. We note also that FSLIC, as the receiver for Old North, has a legally indistinguishable status from Old North; as a result, defendant's counterclaim implicates FSLIC and its power to terminate contracts. Further, the *Gully* decision precedes the passage of the Bank Protection Act of 1968, 12 U.S.C. §§ 1729, 1881-1884, which first authorized federalization of the appointment of a receiver for state savings and loan associations. This act granted FHLBB exclusive authority to regulate FSLIC's activities.

As we observed in our March 12, 1984, order, "questions regarding FSLIC's termination of a contract or its power to do so as a receiver should be addressed to FHLBB, because original jurisdiction over the conduct of FSLIC or the conservator of New North lies with

FHLBB." Any FHLBB administrative determination of defendant's grievances is subject to judicial review under § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. Consequently, dismissal of defendant's counterclaim is appropriate because the state court lacks subject matter jurisdiction over the counterclaim.

Therefore, we conclude that our March 12, 1984, order is not inconsistent with the requirements and mandate of *Gully*, and this action was properly dismissed for the reasons stated in our previous orders.

Accordingly, it is

ORDERED:

That defendant's motion to reconsider is hereby DENIED.

THIS, the 17th day of April, 1984.

/s/ William C. Keady
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4290

D.C. Docket No. WC-83-193-WK

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and
NEW NORTH MISSISSIPPI FEDERAL SAVINGS &
LOAN ASSOCIATION,
Plaintiffs-Appellees,

versus

JOSEPH M. HUDSPETH,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi

[Filed June 17, 1985]

Before THORNBERRY, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

May 23, 1985

Issued as Mandate: Jun. 14, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4290

NORTH MISSISSIPPI SAVINGS & LOAN ASSOCIATION and
NEW NORTH MISSISSIPPI FEDERAL SAVINGS &
LOAN ASSOCIATION,
Plaintiffs-Appellees,

versus

JOSEPH M. HUDSPETH,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Mississippi

[Filed May 23, 1985]

ON PETITION FOR REHEARING

(Opinion 4/5/85, 5 Cir. 1985, 756 F.2d 1096)

Before THORNBERRY, REAVLEY, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is GRANTED. Our opinion of April 5, 1985 is withdrawn and the attached opinion[*] is substituted therefor.

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[*] Opinion of May 23, 1985 is reproduced in Appendix A herein.

APPENDIX D

SECTION 1464 FEDERAL SAVINGS AND LOAN ASSOCIATIONS.

(d) (6) (C) Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or, except at the instance of the [Federal Home Loan Bank Board], restrain or affect the exercise of powers or functions of a conservator or receiver.

* * * *

SECTION 1729 LIQUIDATION OF INSURED INSTITUTIONS.

(a) *Availability of accounts; organization of new association.* In order to facilitate the liquidation of insured institutions, the Corporation is authorized (1) to contract with any insured institution with respect to the making available of insured accounts to the insured members of any insured institution in default, or (2) to provide for the organization of a new Federal savings and loan association for such purpose subject to the approval of the Federal Home Loan Bank Board.

(b) *Powers of corporation on default of Federal Association.* (1) In the event that a Federal association is in default, the Corporation shall be appointed as conservator or receiver and as such—

(A) is authorized—

(i) to take over the assets of and operate such association;

(ii) to take such action as may be necessary to put it in a sound solvent condition;

(iii) to merge it with another insured institution;

(iv) to organize a new Federal association to take over its assets;

(v) to proceed to liquidate its assets in an orderly manner; or

(vi) to make such other disposition of the matter as it deems appropriate;

whichever it deems to be in the best interest of the association, its savers, and the Corporation; and

(B) shall pay all valid credit obligations of the association.

* * * *

(c) *Powers of Corporation and Federal Home Loan Bank Board on default of other institutions.* (1) (A) In the event any insured institution other than a Federal association is in default, the Corporation shall have authority to act as conservator, receiver, or other legal custodian of such insured institution, and the services of the Corporation are hereby tendered to the court or other public authority having the power of appointment. If the Corporation is so appointed, it shall have the same powers and duties with respect to the insured institution in default as are conferred upon it under subsection (b) with respect to Federal associations. If the Corporation is not so appointed it shall pay the insurance as provided in section 405 [12 USCS § 1728], and shall have power (1) to bid for the assets of the insured institution in default, (2) to negotiate for the merger of the insured institution or the transfer of its assets, or (3) to make any other disposition of the matter as it may deem in the best interests of all concerned.

(B) (i) (I) Notwithstanding any provision of the constitution or laws of any State, or of this section, in the event the Federal Home Loan Bank Board determines that any of the grounds specified in section 5(d)(6)(A)(i), (ii), or (iii) of the Home Owners' Loan Act of 1933 [12 USCS § 1464(d)(6)(A)(i), (ii), or (iii)] exist with respect to an insured institution, other than a Federal association, the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole conservator or receiver of such institution.

(II) In such cases the corporation shall have the same powers and duties with respect to insured institutions as are conferred upon it under subsection (b) of this section with respect to Federal associations.

(ii) (I) The authority conferred by this subparagraph shall not be exercised without the written approval of the State official having jurisdiction over the State chartered insured institution that the grounds specified for such exercise exist.

(II) If such approval has not been received by the Board within 90 days of receipt of notice by the State that the Board has determined such grounds exist, and the Board has responded in writing to the State's written reasons, if any, for withholding approval, then the Board may proceed without State approval only by a unanimous vote of the Board. The corporation may also proceed without State approval if the Corporation has been appointed conservator, receiver, or other legal custodian pursuant to State law under subparagraph (A).

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 5(d) of the Home Owners' Loan Act of 1933 [§ 1464(d) of this title], existed with respect to such institution at the time a conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

(3) In any case where the Corporation is appointed conservator or receiver of an insured institution pursuant to paragraphs (1) or (2)—

(A) the provisions of section 5(d) of the Home Owners' Loan Act of 1933 [12 USCS § 1464(d)] shall be applicable in the same manner and to the same extent as if such institution were a Federal savings and loan association with respect to which the Corporation had been appointed conservator or receiver under paragraph (6) thereof, and the provisions of paragraph (14) of said subsection (d) shall be applicable in the same manner and the same extent that they would be applicable if the insured institution were an institution referred to in the first sentence of said paragraph; and

(B) the Corporation shall have authority to liquidate such institution in an orderly manner or to make such other disposition of the matter as it deems to be in the best interests of the institution, its savers, and the Corporation.

(d) *Additional Powers of Corporation.* In connection with the liquidation of insured institutions, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institutions, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the Federal Home Loan Bank Board or, in cases where the Corporation has been appointed conservator, receiver, or legal custodian solely by a public authority having jurisdiction over the matter other than said Board, subject only to the regulation of such public authority.

* * * *

SECTION 1730(k)(1)

(k) *Jurisdiction and enforcement.* (1) Notwithstanding any other provision of law, (A) the Corporation shall be deemed to be an agency of the United States within the meaning of section 451 of title 28 of the United States Code [28 USCS § 451]; (B) any civil action, suit, or proceeding to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and (C) the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district and division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect: Provided, That any action, suit, or proceeding to which the Corporation is a party in its capacity as conservator, receiver, or other legal custodian of an insured State-chartered institution and which involves only the rights or obligations of investors, creditors, stockholders, and such institution under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgment in any action, suit, or proceeding in any court of any State or of the United States or any territory, or any other court.